

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **RAMOS-RIOS, et. al.,**

4 **Plaintiffs,**

5 **v.**

6 **UNITED STATES OF AMERICA, et. al.,**

7 **Defendants.**

CIVIL NO. 12-1985 (GAG)

8 **OPINION AND ORDER**

9 Presently before the court is Defendants' motion in limine seeking to exclude the testimony
10 of three fact witnesses announced by Plaintiffs, who at one point or another were involved in the
11 care, diagnosis and/or treatment of the main plaintiff Roberto Ramos Ríos ("Ramos Ríos"),
12 pursuant to Fed. R. Civ. P. 403. (Docket No. 42.) Defendants also seek to exclude direct evidence
13 which they label as inadmissible, irrelevant, or prejudicial pursuant to Fed. R. Evid. 801 and 702.
14 Id. Plaintiffs did not oppose Defendants' in limine request. Pursuant to Local Rule of Civil
15 Procedure 7(b), "[u]nless within (14) days after the service of a motion the opposing party files a
16 written objection to the motion, incorporating a memorandum of law, the opposing party shall be
17 deemed to have waived objection." D.P.R. Civ. R. 7(b). Rather than opposing Defendants' motion
18 in limine to exclude certain testimony and evidence, Plaintiffs opted not to file a response; thus
19 waiving any objections under Local Rule 7.

20 Defendants' motion in limine seeks to exclude or limit the scope of the testimony of three
21 of Plaintiffs' fact witnesses as announced in the Proposed Joint Pretrial Order (Docket No. 35);
22 physicians Dr. Santos Picó ("Dr. Picó"), Dr. José Manatou ("Dr. Manatou") and Department of
23 Veteran Affairs ("DVA") nurse Nancy Rodríguez. (Docket No. 42 at 2.) Defendants also seek to
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1 exclude from trial direct evidence announced by Plaintiffs in the Proposed Joint Pretrial Order
2 (Docket No. 35 at 25), to wit, the diary or log of events of plaintiff Myrna Ramos Mercado
3 (“Ramos-Mercado”) and evidence of direct economic costs of damages. (Docket No. 42 at 1-2.)

I. Discussion**A. Fact Witnesses Dr. Picó and Dr. Manatou**

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6 Plaintiffs included Dr. Picó and Dr. Manatou as fact witnesses who shall testify “as to their
7 personal knowledge of overall events and medical conditions, and medical opinion.” (Docket No.
8 35 at 23.) As to said physicians, Defendants contend that “personal knowledge of overall events”
9 does not pertain to precise issues related to the present case, suffers from vagueness, and should
10 not be admitted into evidence. (Docket No. 42 at 4.) Defendants moreover posit that the
11 testimonies of Dr. Picó and Dr. Manatou will be unnecessary and delay the process of trial because
12 Plaintiffs already have an expert witness, Dr. Alvarez-Berdecía, who will render his medical
13 opinion; therefore, listing Dr. Picó and Dr. Manatou as fact witnesses constitutes cumulative
14 evidence. Id. As to Dr. Manatou, Defendants specifically question his unbiased opinion and
15 validity of testimony because he is a family friend of plaintiff Miriam Ramos-Mercado. Id.

16 The court first addresses Dr. Picó and Dr. Manatou’s involvement in this case. Based on
17 the facts as alleged by Plaintiffs, both Dr. Picó and Dr. Manatou played a role in the treatment of
18 the main plaintiff during the relevant timeframe for the present action. Dr. Manatou, a family
19 friend of the family, was called for a house visit in 2011 after Ramos Ríos was sent home by Dr.
20 Warrington. (Docket No. 35 at 4.) After evaluating Ramos Ríos in his home, Dr. Manatou
21 immediately ordered an ambulance for Ramos Ríos to receive an adequate medical evaluation at a
22 different medical facility than the one that had previously treated Ramos Ríos. Id. Upon Ramos
23 Ríos’ arrival to HIMA at Caguas, Dr. Picó treated him. Id. Ramos Ríos was then under the care of

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1 Dr. Picó, who diagnosed him with a subdural hematoma and ordered an operation to remove the
2 hematoma. (Docket No. 35 at 4.)

3 In their Proposed Joint Pretrial Order Plaintiffs noted that said physicians' testimonies
4 would be limited to their personal knowledge, medical conditions and opinions. (Docket No. 35 at
5 23.) For that reason, both Dr. Picó and Dr. Manatou were rendered fact witnesses as opposed to
6 expert witnesses.

7 The First Circuit Court of Appeals has held that treating physicians that are presented by a
8 party "to provide testimony arising from their roles as actors in the events giving rise to the
9 litigation . . . are treated as fact witnesses"—not experts—and thus are not subject to the stringent
10 requirements that Fed. R. Civ. P. 26 created for expert witnesses. See Gómez v. Rivera Rodríguez,
11 344 F.3d 103, 113 (1st Cir. 2003); see also González v. Executive Airlines, Inc., 236 F.R.D. 73, 78
12 (D.P.R. 2006). "Accordingly, a party need not identify a witness as an expert [under Rule 26] so
13 long as the witness played a personal role in the unfolding of the events at issue and the anticipated
14 questioning seeks only to elicit the witness's knowledge of those events." Gómez, 344 F.3d at
15 113-14. This is because "the triggering mechanism for [the] application of Rule 26's expert
16 witness requirements is not the status of the witness, but, rather, the essence of the proffered
17 testimony." Gómez, 344 F.3d at 113.

18 Dr. Picó and Dr. Manatou testimonies will explain their personal role in the events at issue,
19 and not their expert medical opinions regarding the cause of Ramos Ríos' damages or Defendants'
20 liability, for example. To that extent, their testimonies are entirely relevant and not cumulative, as
21 Defendants argue. The court notes that Dr. Manatou's relationship as a family friend is irrelevant
22 at this stage, and that fact alone does not raise any red flags. In any event, the validity of his
23 testimony turns on a credibility issue for the jury, not the court, to decide. The bottom line is that

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1 both Dr. Picó and Dr. Manatou are listed as fact witnesses, thus their first-hand testimony shall be
2 based on the personal role they played in the unfolding of events at issue, i.e., during the course of
3 their involvement with and treatment of Ramos Ríos. “[T]aking the plaintiff’s designations in
4 context and crediting his assertion that Drs. [Picó and Manatou] [are] within the penumbra of
5 ‘medical treatment providers,’ it is nose-on-the-face plain that these two physicians were intended
6 to be fact witnesses who would testify only as to the nature of the plaintiff’s condition and the
7 extent of his damages.” Samaan v. St. Joseph Hosp., 670 F.3d 21, 36 (1st Cir. 2012).

8 Consequently, the court **DENIES** Defendants’ motion in limine with respect to the
9 testimonies of Dr. Picó and Dr. Manatou. However, the court cautions that their testimonies must
10 be closely constrained to facts based on their personal knowledge of the events at issue, i.e., their
11 direct involvement in the care, diagnosis, examination and/or treatment of Ramos Ríos. See
12 González, 236 F.R.D. at 78. In other words, Dr. Picó and Dr. Manatou’s testimonies shall not
13 extends beyond the facts made known to them during the course of the care and treatment of
14 Ramos Ríos or their personal knowledge of such related events. Further, they cannot provide an
15 opinion testimony.

16 **B. Fact Witness Nancy Rodríguez**

17 Defendants contend that Nancy Rodríguez (“Rodríguez”) is not a physician, but a Certified
18 Adult Nurse Practitioner (CANP) in the DVA. (Docket No. 42 at 5.) Moreover, they question the
19 relevancy of her testifying on the motor functions of the Ramos Ríos prior to the alleged incident.
20 Id. Defendants also question her testimony’s relevancy because Ramos Ríos has been treated at
21 the DVA for many years prior to the alleged accident and had been diagnosed with multiple
22 medical infirmities. Id. Lastly, Defendants posit that pursuant to DVA Regulations a party
23 seeking testimony of a DVA employee must obtain prior authorization to allow the employee to

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1 testify and a subpoena must be served on the DVA employee. Id. Though Defendants contend
2 that Rodríguez's testimony should not be allowed due to the absence of administrative
3 authorization, they aver her testimony, if rendered, could also be considered cumulative. (Docket
4 No. 42 at 6.)

5 Plaintiffs included Rodríguez as a fact witness who shall testify "as to communication and
6 motor functions capabilities [of plaintiff Roberto Ramos Ríos] before accident at hospital 2010."
7 (Docket No. 35 at 23.) As part of the DVA's medical staff that intervened with Ramos Ríos,
8 Rodríguez has personal knowledge of his conditions and capabilities before the incident at issue in
9 the hospital. Because this case sounds in tort, with her testimony, it seems that Plaintiffs intend to
10 paint a before-and-after picture of Ramos Ríos's condition that touches upon his damages claims,
11 deeming it entirely relevant and non-cumulative. Accordingly, the court **DENIES** Defendants'
12 motion in limine with respect to the testimony of Rodríguez. The court however notes that it is
13 Plaintiffs' responsibility to meet all necessary DVA Regulations requirements for Rodríguez to
14 testify; otherwise, Rodríguez shall not be authorized to provide her testimony in court.¹

15 C. Diary of Myrna Ramos Mercado

16 Plaintiffs intend to use as an exhibit the "Diary/Log of events of Daughter, Myrna Ramos
17 Mercado." (Docket No. 35 at 25.) Defendants, in turn, seek to exclude said evidence. They argue
18 that the diary is not a record kept in the ordinary course of business and that an unsigned, unsworn
19 diary constitutes hearsay because it does not have any guarantees of trustworthiness as required by
20 Fed. R. Evid. 807 because there is no way of knowing when Ramos-Mercado wrote those diary

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22 ¹ Section 14.803(a) of the DVA Regulations on "Testimony of Department Personnel and Production of Department
23 Records in Legal Proceedings" states that: "VA personnel may provide testimony or produce VA records in legal
24 proceedings covered by §§ 14.800 through 14.810 only as authorized in accordance with these regulations." 38 C.F.R.
§ 14.803

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1 entries and they may be easily altered or edited to favor Plaintiffs' arguments. (Docket No. 42 at
2 6-7.)

3 As mentioned above, Plaintiffs failed to oppose Defendants' motion in limine, thus waiving
4 their objections under Local Rule 7 and, in turn, failing to espouse a reason why this diary should
5 not be excluded as evidence. Moreover, Plaintiffs did not elucidate in the Proposed Joint Pretrial
6 Order the reason why they seek to offer the diary as evidence. The outcome of Plaintiffs'
7 omissions is that the court cannot ascertain the purpose and extent to which Plaintiffs seek to admit
8 the proffered diary as evidence during trial—the court is not a mind reader.

9 If the diary is submitted to prove that the recorded events actually occurred, the diary
10 entries are hearsay. Collins v. Kibort, 143 F.3d 331, 338 (7th Cir.1998); see Emerson v. Zanke,
11 522 F. Supp. 2d 281, 282 (D. Me. 2007). Diary entries may be admissible under Rule 803(5) or
12 certain other exceptions. See Collins, 143 F.3d at 338; Emerson, 522 F. Supp. 2d at 282.
13 Admissibility depends on the trial context and here, the court does know whether Plaintiffs, like
14 Defendants suggest, intend to use the diary itself to prove the truth of the matter asserted in the
15 entries included therein. This would necessarily constitute inadmissible hearsay, tarnishing the
16 diary with dubious admissibility. Mindful of the court's "gatekeeping" obligation and because it
17 cannot determine the probative value of the Ramos-Mercado diary, Defendants' motion in limine
18 as to this diary is **GRANTED** and said evidence is hereby excluded.

19 **D. Evidence of direct economic costs of damages**

20 Plaintiffs included as their exhibits "direct economic costs of damages" in the Proposed
21 Joint Pretrial Order. (Docket No. 35 at 25.) Defendants contend that evidence on this matter
22 requires expert testimony and that the deadline for the parties to announce their expert witnesses
23 has expired. See Docket No. 23. Defendants aver that, even though said period elapsed, an

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1 economic damages report must be prepared by a qualified expert in medicine and life expectancy,
2 as it requires several factors to be considered for Plaintiff to present a credible and qualified expert
3 testimony related to the economic damages of plaintiff Ramos Ríos. (Docket No. 42 at 8.)
4 Defendants argue that Plaintiffs intend to present an expert report pertaining to the alleged
5 economic damages suffered by the main plaintiff and that said report must be prepared by a
6 qualified expert in medicine and life expectancy. Id. Defendants thus seek to exclude this
7 evidence.

8 Plaintiffs' lack of specificity and clarification in merely listing "direct economic costs of
9 damages" and failure to oppose Defendants' request to exclude said evidence makes it near
10 impossible for the court to determine the nature and scope of the documentary evidence they seek
11 to utilize during trial. Defendants argue that said statement necessarily means that Plaintiffs seek
12 to introduce an expert report as to the main plaintiff's economic damages, without announcing said
13 expert within the court's imposed deadline.

14 Defendants are correct in their proclamation that the court-established deadline for
15 Plaintiffs to announce their expert witnesses and submit reports elapsed on November 11, 2013—
16 over a year ago. See Docket No. 23. Plaintiffs thus failed to list an expert witness to testify or
17 provide an expert report as to Ramos Ríos's direct costs of economic damages in a timely fashion.
18 In addition, Plaintiffs failed to oppose Defendants' motion in limine and, as a consequence waived
19 any objections to this admissibility issue under Local Rule 7. The court is thus persuaded by
20 Defendants' arguments to exclude this evidence. Accordingly, Defendants motion in limine is
21 **GRANTED** as to Plaintiffs' exhibit pertaining to the direct economic costs of damages.

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II. Conclusion

For the reasons set forth above, Defendants' motion in limine at Docket No. 42 is hereby **DENIED in part** and **GRANTED in part**. The motion is **DENIED** as to the testimonies of the three fact witnesses sought to be excluded: the testimonies of Dr. Picó, Dr. Manatou and Rodríguez. Said testimonies are hereby allowed within the limitations articulated in this opinion. Concerning the direct evidence sought to be excluded by Defendants, the diary of Ramos-Mercado and the direct economic costs of damages, the motion is **GRANTED** and said evidence is hereby excluded as inadmissible.

SO ORDERED.

In San Juan, Puerto Rico this 18th day of November, 2014.

s/ Gustavo A. Gelpí

GUSTAVO A. GELPI

United States District Judge